

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

JASON SHURB

Plaintiff,

v.

THE UNIVERSITY OF TEXAS HEALTH
SCIENCE CENTER AT HOUSTON-SCHOOL
OF MEDICINE, et al.

Defendants.

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Case No.:4:13-cv-271

**EMERGENCY MOTION FOR RECONSIDERATION OF ORDER DENYING
PLAINTIFF'S MOTION FOR CONTINUANCE OF TRIAL**

TO THE HONORABLE KENNETH M. HOYT:

NOW COMES Plaintiff, JASON SHURB, filing this, Motion for Reconsideration pursuant to FRCP 59(e) regarding the Order Denying Plaintiff's Motion for Continuance of Trial, and in support hereof, shows this honorable Court the following:

I. Facts

This case is set for trial on September 22, 2014. A continuance was previously requested until at least January of 2015 in Plaintiff's Emergency Motion for Continuance of Trial. (Doc. 79).

In support of that motion, Plaintiff argued that good cause exists to continue the trial because Plaintiff was and is currently in severe physical pain due to gallbladder stones. Plaintiff informed the Court that he was hospitalized for this condition and he was informed by his physician that it is medically necessary to undergo a surgical procedure to remove his gallbladder. The earliest date on which Plaintiff was able to schedule the procedure was October 17, 2014. Id.

Plaintiff requested a continuance of the trial because he was informed that he would continue to be in pain during the weeks leading up to his surgery. Plaintiff was prescribed pain medication and as a result, he would not be able to participate or testify in the trial of this matter while in severe pain and while taking pain medications. *Id.*

On September 11, 2014, the Court denied Plaintiff's request for a continuance stating that no emergency situation exists in light of the timing of the surgery. (Doc. 81).

Newly Discovered Evidence

On the morning of September 15, 2014, Plaintiff was taken by ambulance to North Central Baptist Hospital in San Antonio, Texas. Plaintiff was diagnosed by Dr. Neelima Upputuri with pancreatitis, likely caused by a gallstone becoming lodged in his pancreas. Plaintiff was admitted to the hospital and was evaluated by a surgeon, Dr. Craig See, to determine if surgery could be performed to remove his gallbladder and the stone(s) lodged in his pancreas. Dr. See determined that the pancreatitis needed to be treated and controlled before any surgery could take place, which would take at least 2-3 days. Once the pancreatitis is controlled, Plaintiff may require an initial surgery to repair the pancreas. The pancreas would need a few more days to heal after the surgery, then, at that time, Dr. See would perform the gallbladder surgery. It is unknown how long Plaintiff will be hospitalized, but it is likely he will still be hospitalized on Monday, September 22, 2014 when the trial is set to begin. Additionally, once Plaintiff is released from the hospital, he will not be in a condition to participate in a trial for several weeks. Plaintiff has requested documentation from his physicians confirming these facts, but so far he has not received anything.

II. Argument

Rule 59(e) permits a litigant to file a motion to alter or amend a judgment. Fed. R. Civ. P.

59(e) (“A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.”) Reconsideration of a judgment is an “extraordinary remedy,” and Rule 59(e) serves a narrow purpose of allowing a party to bring errors or newly discovered evidence to the Court’s attention. *Templet v. Hydrochem, Inc.*, 367 F.3d 473, 478 (5th Cir. 2004). A litigant seeking relief under Rule 59(e) “must clearly establish either a manifest error of law or fact or must present newly discovered evidence.” *Balakrishnan v. Bd. of Supervisors of Louisiana State Univ. & Agr. & Mech. Coll.*, 452 F. App’x 495, 499 (5th Cir. 2011) (citing *Ross v. Marshall*, 426 F.3d 745, 763 (5th Cir. 2005)). A Rule 59(e) motion cannot be used to argue a case under a new legal theory. *Id.* citing *Ross*, 426 F.3d at 763.

Plaintiff is entitled to relief from the Court’s September 11, 2014 Order denying his request for continuance of trial in light of new evidence and information obtained on the morning of September 15, 2014. As is set forth above, Plaintiff was admitted on September 15, 2014 to North Central Baptist Hospital with pancreatitis which will require the next 2 to 3 days to control. Plaintiff will then require immediate surgery to remove a gallstone from his pancreas.

A few days after his that surgery, Plaintiff will then require a surgery to remove his gallbladder and it is likely he will still be hospitalized on September 22, 2014. Once Plaintiff is released from the hospital, he will not be in a condition to participate in a trial for several weeks. This newly discovered evidence of Plaintiff’s hospitalization and inability to appear and participate in the trial set to begin September 22, 2014 constitutes a sufficient and extraordinary basis by which the Court may reconsider its September 11, 2014 Order denying Plaintiff’s motion for continuance of the trial.

Additionally, Plaintiff’s counsel would then not able to participate in a trial until January

2015 at the earliest. Due to the Plaintiff counsel's prior commitments in other federal and state court cases, Plaintiff's counsel seeks a continuance until of the trial until at least January 2015. The undersigned counsel for Plaintiff in this action is also lead counsel in the state case *Friedman v. Arrington*, Civil Action No. C-1-CV-12-4930, County Court of Travis County, Texas. Plaintiff's counsel is set to begin a trial in that matter, which will take place during either the week of October 20, 2014 or November 3, 2014.

Plaintiff's counsel is also lead counsel in the federal case entitled *Jane Doe v. Crown Point School Corp.*, Civil Action No. 2:12-cv-264, Northern District of Indiana, and is required to travel out of state for depositions in that case during the week of October 27, 2014 and November 17, 2014. Plaintiff's counsel is also lead counsel in the federal case entitled *Zimmeck v. Marshall University*, Civil Action No. 3:13-cv-14743, Southern District of West Virginia, and is required to participate in depositions in that case through November 21, 2014.

Plaintiff's counsel is also moving law offices in October and November 2014 and will be out of the country on a pre-paid family vacation from December 4, 2014 through December 15, 2014.

Plaintiff's counsel has discussed a continuance of the trial in this matter with counsel for Defendant. Defendant is not opposed to continuing the current trial date but is opposed to a continuance of the trial past October 2014. This request for continuance is made in good faith, in the interests of justice, and is not for the purpose of undue delay.

WHEREFORE, Plaintiff requests the Court amend its prior order pursuant to Fed. R. Civ. P. 59(e), vacate the September 22, 2014 trial, and set a new trial no earlier than January 2015. A proposed order to this effect is attached to this motion.

Respectfully submitted:

/s/ Jason J. Bach
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CERTIFICATE OF CONFERENCE

This is to certify that on September 15, 2014 a conference was held with counsel for Defendants regarding the relief requested in this motion. Counsel has been informed that Defendants are opposed to the relief requested.

s/ Jason J. Bach

JASON J. BACH

NOTICE OF ELECTRONIC FILING

The undersigned counsel hereby certifies that he has electronically submitted for filing a true and correct copy of the above and foregoing in accordance with the Electronic Case Files System of the Southern District of Texas on the 15th day of September, 2014.

s/ Jason J. Bach

JASON J. BACH

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of September, 2014, I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Southern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the following attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means:

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s/ Jason J. Bach

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